(b)(6)

U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

[redacted]

DATE: NOV 07 2013 OFFICE: TEXAS SERVICE CENTER FILE: [redacted]

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Immigrant Petition for Member of the Professions Holding an Advanced Degree or Alien of Exceptional Ability Pursuant to Section 203(b)(2)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)(A)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office (AAO) in your case.

This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at http://www.uscis.gov/forms for the latest information on fee, filing location, and other requirements.** *See also* 8 C.F.R. § 103.5. **Do not file a motion directly with the AAO.**

Thank you,

Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center (director), denied the employment-based, immigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. After consultation with the U.S. Department of Labor (DOL), the director's decision will be withdrawn. The appeal will be remanded to the director for further action, consideration, and the entry of a new decision in accordance with below.

The petitioner provides software development services. It seeks to permanently employ the beneficiary in the United States as a programmer analyst. The petitioner requests classification of the beneficiary as a member of the professions holding an advanced degree or an alien of exceptional ability pursuant to section 203(b)(2)(A) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2)(A).

An ETA Form 9089, Application for Permanent Employment Certification (labor certification), which the DOL certified, accompanies the petition. The priority date of the petition, which is the date the DOL accepted the labor certification for processing, is August 4, 2011. *See* 8 C.F.R. § 204.5(d).

The director's decision denying the petition concludes that the petitioner failed to establish a *bona fide* job offer and its intent to employ the beneficiary in the offered position. The director also found that the petitioner fraudulently represented information to government officials. Accordingly, on July 2, 2012, the director denied the petition.

The record shows that the appeal is properly filed and makes a specific allegation of error in law or fact. The procedural history in this case is documented by the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary.

The AAO conducts appellate review on a *de novo* basis. *See Soltane v. Dep't of Justice*, 381 F.3d 143, 145 (3d Cir. 2004). The AAO considers all pertinent evidence in the record, including new evidence properly submitted on appeal.[1]

The director's findings stem from differing addresses of the petitioner on the labor certification and the petition. The labor certification states the petitioner's address in [redacted] Massachusetts as the area of intended employment. ETA Form 9089 Part H.1, regarding the proposed worksite, also states: "Future Locations May Vary." In addition, ETA Form 9089 Part H.14, regarding special requirements, states that a worker in the offered position "[m]ust be willing to travel/relocate to anywhere in the US on short notice for extended periods of time."

[1] The instructions to Form I-290B, Notice of Appeal or Motion, which 8 C.F.R. § 103.2(a)(1) incorporates into the regulations, allow the submission of additional evidence on appeal. The record in the instant case provides no reason to preclude consideration of any of the documents newly submitted on appeal. *See Matter of Soriano*, 19 I&N Dec. 764, 766 (BIA 1988).

On the Form I-140, Petition for Alien Worker, the petitioner states its address in Boston, Massachusetts. Form I-140, Part 6.4., which asks for the address where the beneficiary will work if it differs from the petitioner's address, states: "Future locations may vary."

On May 1, 2012, the director issued a Request for Evidence (RFE) to the petitioner. Citing online information, the RFE asserted that the petitioner's president lives in a house at the address stated on the labor certification. The RFE also asserted that two of the petitioner's three addresses on its website - including the address stated on the Form I-140 – constituted "virtual offices," which were work spaces, already staffed and equipped, that the petitioner leased and used on an "as-needed" basis. In the RFE, the director expressed doubt that the petitioner intended to employ a full-time programmer analyst at the addresses stated on the labor certification, the petition, and its website, and requested business, financial, tax, payroll, recruitment and immigration documentation to demonstrate the petitioner's intent to employ the beneficiary in the offered position.

The petitioner timely responded to the RFE with more than 1,000 pages of documentation. In an affidavit, its president acknowledged that he lived at the address, where he purportedly worked from an office in his home. He stated that the offered position involves telecommuting and working at the sites of unknown, future clients across the United States. He asserted that the petitioner followed case law and DOL guidance by both filing the labor certification and advertising the offered position in the area of his home office in He stated there was "no particular reason" the petitioner used its address on the Form I-140. "For business and marketing purposes," he stated that the petitioner had "recently tried to route much of [its] correspondence through the address," where the office purportedly has mail collection and telephone-answering services.

The director found that the petitioner failed to provide all of the documentation requested in the RFE. Specifically, he found that the petitioner's RFE response lacked: copies of its lease agreements for the virtual offices in evidence of regular business activity at its office; and telephone records for the phone number it listed on the Form I-140. The director concluded that the petitioner failed to establish its intent to employ the beneficiary in the offered position and fraudulently represented information on the labor certification and in the petition.

On appeal, the petitioner denies that it misrepresented any information to the DOL or U.S. Citizenship and Immigration Services (USCIS). It provides copies of its lease agreements for the offices in and and claims that it included copies of these agreements with its RFE response.[2] The petitioner provides no evidence of its regular business activity at the office, reiterating that most of its employees work at client sites and not in its offices. The petitioner also states that it mistakenly provided telephone records for company phone numbers other than the number specified in the RFE. On appeal, the petitioner provides copies of monthly bills for the specified number from December 2010 through April 2012. The petitioner's president also states that he uses the specified phone number

[2] The AAO found a copy of the lease agreement for the office in the petitioner's RFE response, which appeared to be out-of-order in the case file. The AAO did not find a copy of the office agreement in the response, although the response included other information about the office.

as a "landline" at his home office and does not consider it to be the company's primary business number.

A labor certification remains valid only for the particular job opportunity, the alien worker, and the area of intended employment stated on the ETA Form 9089. 20 C.F.R. § 656.30(c)(2). The DOL defines the term "area of intended employment" as "the area within normal commuting distance of the place (address) of intended employment." 20 C.F.R. § 656.3. If the proposed worksite is within a Metropolitan Statistical Area (MSA) or a Primary Metropolitan Statistical Area (PMSA), the area of intended employment includes any place within the MSA or PMSA. *Id.*

If the offered position involves work at various sites across the U.S. that the employer cannot anticipate, the employer properly files the labor certification and properly recruits for the position in the area of its headquarters or main office. *Matter of Amsol, Inc.*, 2008-INA-00112, 2009 WL 2869970 at **7-8 (BALCA Sep. 3, 2009) (citing Memorandum from Barbara Ann Farmer (Farmer memo), DOL Emp't & Training Admin'r for Reg'l Mgmt., to Reg'l Admin'rs, § 10 (May 16,1994); *Matter of eBusiness Applications Solutions, Inc.*, 2005-INA-00087, 2006 WL 4579779 at **6-7 (BALCA Dec. 6, 2006). Employers should also state on their labor certification applications that the aliens will be working at "various unanticipated locations throughout the U.S." Farmer memo at § 10.

USCIS properly denies a petition where the petitioner does not intend to employ the beneficiary in the geographical area of intended employment stated on the labor certification. *See Sunoco Energy Dev. Co.*, 17 I&N Dec. 283, 284 (Reg'l Comm'r 1979); *see also Matter of Izdebska*, 12 I&N Dec. 54, 55 (Reg'l Comm'r 1966) (upholding the denial of a petition where the petitioner did not intend to employ the beneficiary under the terms of the labor certification).

USCIS may also invalidate a labor certification upon determining "fraud or willful misrepresentation of a material fact involving the labor certification application." 20 C.F.R. § 656.30(d).

Because of questions about the worksite addresses of the offered position in the instant case, the AAO consulted the DOL. *See* section 204(b) of the Act, 8 U.S.C. § 1154(b) (employment-based immigrant visa petitions should be adjudicated "after consultation with the Secretary of Labor").

In a letter dated July 18, 2013, Dr. [redacted] DOL Administrator, Office of Foreign Labor Certification, informed the AAO that the DOL "does not have substantive concerns about the addresses presented on the ETA Form 9089 and will not initiate the revocation process for the approved labor certification on this basis." The letter states that the petitioner sufficiently stated on the labor certification that the offered position involves work at various, unanticipated sites, and followed case law and DOL guidance by recruiting for the offered position from its headquarters or main office. The letter states that "[t]he fact that the [redacted] Massachusetts address is a home office does not preclude it from being a headquarters or main office of the employer."

The letter also states that both [redacted] are within the same combined statistical area and that the petitioner "did not gain a wage advantage by using the [redacted] address over another

metropolitan area." The petitioner also submits copies of DOL online wage surveys showing that the prevailing wage for the offered position in was higher than the position's prevailing wage in where the beneficiary was working on a client site when the petitioner filed the labor certification.

Petitions involving "virtual offices" deserve scrutiny. In *eBusiness*, the Board of Alien Labor Certification Appeals (BALCA) considered the case of a New Jersey company that created a virtual office in Delaware to which it nominally assigned workers for labor certification purposes. *eBusiness*, 2006 WL 4579779 at *7. The BALCA affirmed the denial of 10 of the company's labor certifications, noting that it had stated its New Jersey headquarters as its legal address and place of business on the H-1B work visa petitions of the labor certification beneficiaries. *Id.* at *2. Also, 36 of the 50 businesses on the client list that the company submitted to DOL were located in New Jersey, and none were in Delaware. *Id.* The BALCA stated that it suspected the employer created the Delaware office to avoid testing the relevant labor market for qualified U.S. workers and to reduce the processing times of its labor certification applications. *Id.* at *8. The BALCA stated that "[t]he fact that the 'new economy' frequently includes jobs without fixed work sites does not mandate that the Department of Labor accept a fictionalized location for a job offering as the basis for a labor certification application." *Id.*

Unlike the employer in *eBusiness*, however, the instant petitioner submits sufficient evidence that it did not establish a virtual office outside the area of its headquarters for labor certification purposes. The petitioner provides evidence that the home office of its president in Massachusetts was its legal and primary business address. The petitioner submits numerous business documents that state its address in including copies of: its 2011 corporate annual report; its 2010 and 2011 federal income tax returns; the beneficiary's H-1B visa petition, which it filed in June 2010; the lease agreements for its offices, dated July 6, 2010 and November 29, 2011, respectively; telephone bills from December 2010 through July 2012; and an April 2006 contract with the client that the beneficiary served in In addition, copies of the petitioner's annual federal unemployment tax returns, which also state its address in show that some of its employees worked in Massachusetts each year from 2008 through 2011.

The record also contains documents that state the petitioner's address in including copies of: email messages from its president from March 2011 through June 2012; an amended client contract, dated May 1, 2011; and the beneficiary's pay stubs from October 2011 and May 2012. Most of these documents are more recent than the documents with the address and seem to confirm the statement of the petitioner's president that the company has recently tried to funnel most of its correspondence to the office.

Whether the address constitutes the petitioner's headquarters or main office, however, does not appear to affect the validity of the labor certification. Copies of the petitioner's recruitment materials show that it advertised the offered position in Sunday editions of *The* newspaper. largest newspaper and consistently ranks among the nation's top 10 Sunday newspapers in circulation. *See* "About Us" at (accessed Aug. 28, 2013). The

advertisements state that the position requires a willingness to travel and relocate. Therefore, even if the petitioner's address, rather than its address, was its legal and primary business address, the petitioner would have advertised the offered position in the relevant labor market. As discussed above, the DOL found that the petitioner did not gain a wage advantage by stating as the area of intended employment.[3] The AAO therefore finds that the petitioner did not establish its office solely for the labor certification or other immigration purposes.

The record also shows that the petitioner's employees work at various client sites across the United States. Copies of the petitioner's federal unemployment tax returns show that its employees, from 2008 through 2011, worked in Massachusetts, North Carolina, Arizona, New Jersey, New York, Florida, Tennessee and Illinois. The AAO therefore finds that the record demonstrates that the petitioner could not anticipate the beneficiary's worksite and properly filed the labor certification from the area of its headquarters pursuant to case law and DOL guidance. The AAO also finds that the petitioner has established a *bona fide* job offer to the beneficiary and its intent to employ the beneficiary in the offered position under the terms of the labor certification.[4]

In his decision, the director stated that the petitioner "submitted falsified documents in order to obtain a benefit under [the Act] through fraud and misrepresentation of a material fact." The director's decision does not specify which documents were falsified or what material fact was misrepresented. The AAO does not find substantial evidence of any falsified documents in the record or the misrepresentation of any material facts.

The AAO cannot find that the inconsistent addresses, which the DOL has stated do not affect the validity of the labor certification, constitute fraud or misrepresentation of a material fact. The petitioner has established its locations and the legitimacy of it business operations. After careful review, the AAO finds that the record does not support a conclusion that the petitioner engaged in fraud or misrepresentation of a material fact.

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[3] The petitioner's address no longer appears on its website. Its website now states an address in Massachusetts, in addition to the addresses for the offices in and (accessed Aug. 28, 2013). Online records of the Massachusetts Secretary of the Commonwealth, Corporations Division, also show that the petitioner changed its principal place of business from the address to the address on April 17, 2013. *See* (accessed Aug. 28, 2013). are adjacent communities in The offices are in the same area of intended employment. The AAO therefore does not find the change of location in the petitioner's principal business office to affect this decision.

[4] In his July 25, 2012 affidavit, the petitioner's president states that the petitioner no longer employs the beneficiary. The president, however, states that the petitioner continues to offer the permanent job opportunity to the beneficiary and intends to employ him in the offered position upon his grant of lawful permanent resident status.

The record, however, does not establish that the petition is immediately approvable. The petitioner has not established that the beneficiary possesses the qualifying experience for the offered position of programmer analyst.

The petitioner must establish that the beneficiary possessed all the education, training, and experience specified on the labor certification as of the petition's priority date. 8 C.F.R. §§ 103.2(b)(l), (12); *see also Matter of Wing's Tea House,* 16 I&N Dec. 158, 159 (Acting Reg'l Comm'r 1977); *Matter of Katigbak,* 14 I&N Dec. 45, 49 (Reg'l Comm'r 1971). In evaluating the beneficiary's qualifications, USCIS must look to the job offer portion of the labor certification to determine the requirements for the offered position. USCIS may not ignore a term of the labor certification, nor impose additional requirements. *See Madany* v. *Smith,* 696 F.2d 1008, 1015 (D.C. Cir. 1983); *K.R.K. Irvine, Inc.* v. *Landon,* 699 F.2d 1006, 1009 (9th Cir. 1983); *Stewart Infra-Red Commissary of Mass., Inc.* v. *Coomey,* 661 F.2d 1, 3 (1st Cir. 1981).

In the instant case, the labor certification states that the offered position requires a master's degree, or a foreign equivalent degree, in computer science, engineering, physics, math or a related field, plus 12 months of experience in the job offered or as an IT consultant, systems executive, software engineer, or lead developer. The labor certification also states that the petitioner will accept an alternate combination of a bachelor's degree and five years of employment experience to satisfy the requirements of the offered position.

The petitioner claims that the beneficiary qualifies for the offered position based on the alternate combination of a bachelor's degree and five years of employment experience. On the labor certification, the beneficiary claims to qualify for the offered position based on his bachelor's degree in mechanical engineering followed by about 13 years of computer-related experience before the petition's priority date. The labor certification states that the beneficiary worked:

- About 24 months as a computer programmer/analyst for [redacted] in India from July 20, 1998 to July 26, 2000;
- About 43 months as a senior systems executive/programmer for [redacted] in India from July 31, 2000 to March 4, 2004;
- About three months as an associate consultant/programmer for [redacted] in India from March 8, 2004 to May 25, 2004;
- About 23 months as a senior analyst for [redacted] in the United Arab Emirates from June 5, 2004 to April 30, 2006;
- About 16 months as a software engineer/programmer for [redacted] in the U.S. from August 1, 2006 to December 14, 2007;
- About 30 months as a lead developer/programmer analyst for [redacted] in the U.S. from December 19, 2007 to July 3, 2010; and
- About 13 months as a programmer analyst for the petitioner in the U.S. from July 4, 2010 until the filing of the labor certification on August 4, 2011.

The petitioner must support the beneficiary's claimed qualifying experience with letters from his

employers, giving their names, addresses, and titles, and descriptions of the beneficiary's experience. *See* 8 C.F.R. § 204.5(g)(1). The record contains letters from five previous employers of the beneficiary, including:

- A November 8, 2011 letter signed by a purported divisional manager on stationery, stating that the company employed the beneficiary from July 31, 2000 to March 5, 2004, most recently as a senior system executive. The letter also includes a brief description of the beneficiary's experience as a senior system executive.
- A November 7, 2011 letter signed by a purported senior vice president of stating that the company employed the beneficiary from March 8, 2004 to May 25, 2004, most recently as an associate consultant. The letter also includes a brief description of the beneficiary's duties with the company.
- A May 2, 2006 letter signed by a purported vice president on stationery, stating that the company employed the beneficiary from June 5, 2004 to April 30, 2006, most recently as a senior analyst.
- A December 4, 2009 letter signed by a human resources representative on stationery, stating that the company employed the beneficiary from June 14, 2006 to December 17, 2007. The letter also includes a brief description of his job duties with the company.
- A November 14, 2011 letter signed by a purported business partner on stationery, stating that the company employed the beneficiary from December 17, 2007 to July 6, 2010 and identifying his last position as lead developer analyst.

Although the letters from identify the projects on which the beneficiary purportedly worked and the programs and technologies he purportedly used during his tenures with those companies, the letters do not specify his actual job duties with the employers. The letters do not describe the beneficiary's experience sufficiently enough for the AAO to determine whether he gained qualifying experience at these companies.

In addition, the letter from states that it last employed the beneficiary as a senior system executive and describes his experience only in that position. The letter does not state how long the beneficiary served as a senior system executive and what other positions, if any, the beneficiary held during his 43-month tenure with the company. The letter also does not describe the beneficiary's experiences in other positions he might have held. The letter therefore does not allow the AAO to determine the amount of qualifying experience the beneficiary gained with

Disregarding the letters from for the reasons stated above, the petitioner has established that the beneficiary possessed the following qualifying experience; about three months at and about 18 months at The total 21 months of qualifying experience does not meet the five years, or 60 months, of alternate experience required by the labor certification and for the requested classification of advanced degree professional. *See* 8 C.F.R § 204.5(k)(2) (stating that a bachelor's degree or a foreign equivalent degree followed by at least five years of progressive experience in the specialty shall be considered as an "advanced degree").

As USCIS has not afforded the petitioner an opportunity to address this issue, the petition will be remanded to the director for consideration of the foregoing.

Also, the petitioner has failed to establish its continuing ability to pay the beneficiary's proffered wage as of the petition's priority date. *See* 8 C.F.R. § 204.5(g)(2).

According to USCIS records, the petitioner has filed at least 14 I-140 petitions for other beneficiaries since 2002. The petitioner must establish its continuing ability to pay the combined proffered wages of all beneficiaries whose petitions were pending since the instant petition's priority date. *See Matter of Great Wall*, 16 I&N Dec. 142, 144-145 (Acting Reg'l Comm'r 1977); 8 C.F.R. § 204.5(g)(2).

Although the petitioner responded to the director's request for evidence of the petitions it has filed since 2009, quota backlogs in employment-based preference categories might have caused petitions that it filed earlier to remain pending after the instant petition's priority date. The petitioner must therefore provide evidence of its pre-2009 petitions, as the record does not document: their priority dates; proffered wages; the wages the petitioner paid to their beneficiaries; whether any of those petitions were withdrawn, revoked, or denied; and whether any of those beneficiaries obtained lawful permanent residence.

As USCIS has not afforded the petitioner an opportunity to submit evidence of its earlier-filed petitions, the petition also will be remanded to the director for consideration of this issue.

In summary, after consultation with the DOL, the AAO finds that the accompanying labor certification remains valid, and that the petitioner has established a *bona fide* job offer and its intent to employ the beneficiary in the offered position. The AAO also finds that the record does not support a finding that the petitioner engaged in fraud or misrepresentation of a material fact in the labor certification or the petition. Accordingly, the director's July 2, 2012 decision denying the petition will be withdrawn.

The petition, however, is not otherwise immediately approvable. The record does not establish the beneficiary's possession of the required alternate experience for the offered position by the petition's priority date, and the petitioner's continuing ability to pay the proffered wage from the priority date onward. Therefore, the petition will be remanded to the director for consideration of these issues and any others the director deems appropriate. The director may request any evidence relevant to the outcome of the decision and should afford the petitioner a reasonable opportunity to respond. Upon review and consideration of any response, the director shall enter a new decision.

In visa petition proceedings, the petitioner must establish its eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, the petitioner has not met its burden.

ORDER: The director's decision of July 2, 2012 is withdrawn; the petition, however, is not immediately approvable for the reasons discussed above, and the AAO therefore may

not approve it. Because the petition is not approvable and USCIS did not afford the petitioner an opportunity to address the reasons, the petition is remanded to the director to allow the petitioner a reasonable opportunity to respond and for issuance of a new, detailed decision.